



In the Matter of:

THOMAS H. SMITH,

ARB CASE NO. 97-065

COMPLAINANT,

(ALJ Case No. 93-ERA-16)

v.

**ESICORP, INC., formerly
Known as EBASCO
CONSTRUCTORS, INC.**

DATE: April 3, 1997

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

**NOTICE OF REVIEW
AND
ORDER ESTABLISHING BRIEFING SCHEDULE
AND
ORDER REGARDING COMPLAINANT'S MOTION
FOR PRELIMINARY ORDER**

The Administrative Law Judge's February 26, 1997 Recommended Decision and Order (R. D. and O.) Awarding Damages has been referred to the Board for review. The following briefing schedule is established in this case. Respondent may file an initial brief, not to exceed 30 double spaced typed pages, on or before **May 5, 1997**. Complainant may file a reply brief, not to exceed 30 double spaced typed pages, on or before **June 4, 1997**. Respondent may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed 15 double spaced typed pages, on or before **June 19, 1997**.

^{1/} This matter was filed pursuant to the employee protection provisions of the Energy Reorganization Act, as amended, 42 U.S.C. § 5851 (1988). On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under these statutes and the implementing regulations (29 C.F.R. Part 24) to the Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also published on May 3, 1996.

All pleadings and briefs are expected to conform to the stated page limitations unless prior approval of the Board has been granted and should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced, with minimum one-inch left and right margins and minimum 1.25-inch top and bottom margins, printed on 8½ by 11-inch paper. An original and four copies of all pleadings and briefs shall be filed with the Board.

Docket entries for this matter shall be filed by directing submissions to the attention of the undersigned at:

Administrative Review Board
United States Department of Labor
200 Constitution Avenue, N.W.
Room S-4309
Washington, D.C. 20210

ORDER REGARDING COMPLAINANT'S MOTION FOR PRELIMINARY ORDER

As noted, on February 26, 1997, the Administrative Law Judge (ALJ) issued his R. D. and O. Awarding Damages in this case arising under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993), as amended by the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, 3123. The ALJ awarded Complainant \$100,000.00 in compensatory damages. R. D. and O. at 12. Additionally, the ALJ awarded \$34,750.00 to Complainant's counsel as attorney's fees and the additional amount of \$1,696.19 as costs. *Id.*

Subsequently, Complainant filed with the Board a motion seeking a preliminary order, pursuant to the ERA, "ordering that all of Mr. Smith's out-of-pocket expenses and attorney fees and costs provided for in Judge Kerr's recommended decision be paid now to Mr. Smith and his counsel, respectively, pending DOL's further review and any appeals by the employer." Complainant's Motion for Preliminary Order, p. 1. For the following reasons, Complainant's motion is **denied**.

In 1992 the employee whistleblower provision of the ERA was amended in several respects by Section 2902 of the CNEPA. It provides in pertinent part:

Upon the conclusion of [a public hearing before an ALJ] and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order.

* * * *

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. § 5851(b)(2)(A) & (B) (1988 and Supp. V 1993).^{2/}

The amended provision authorizing preliminary orders regarding damages and attorney's fees and costs is not applicable to this case, which was filed^{3/} prior to the effective date of the CNEPA, which specifies:

APPLICABILITY.--The amendments made by this section shall apply to claims filed under section 211(b)(1) of the Energy Reorganization Act of 1974 (42 U.S.C. § 5851(b)(1)) on or after the date of the enactment of this Act.

CNEPA, Pub.L. 102-486, 106 Stat. 2776 (Oct. 24, 1992), § 2902(i). *See also, Smith v. Ebasco*

^{2/} Subparagraph B was not amended by the CNEPA. On March 16, 1994, the Secretary of Labor proposed regulations to implement the CNEPA amendments to the ERA. 59 Fed. Reg. 12506. These regulations have not yet been finalized.

^{3/} *See* U. S. Department of Labor, Wage and Hour Division letter, dated December 29, 1992, to Thomas H. Smith, p.1, ¶ 1.

Constructors, Inc., Sec. Dec. March 16, 1996, slip op. at p. 1, n.2. Thus, the Board is without authority to issue a preliminary order regarding Complainant's motion for expenses, attorney's fees and costs.

SO ORDERED.

DAVID A O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member